

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**RICK SHIMITZ, on his own behalf and
as natural guardian, parent and next
friend, DARCEY SHIMITZ, on her own
behalf and as natural guardian,
parent and next friend, and CHAD
SCHROEDER,**

Plaintiffs,

v.

**TYSON FRESH MEATS, INC.,
f/k/a IBP, INC.,**

Defendant.

CASE NO. 8:01CV27

**MEMORANDUM
AND ORDER**

This matter is before the Court following the filing of the Affidavit of Darcey Shimitz at the Court's request and in answer to the Defendant's Motion to Require Substitution of Real Party in Interest, and upon the Unopposed Motion to Continue Trial.

Based on the Affidavit of Darcey Shimitz, the Court finds that Chad Schroeder reached the age of majority during the pendency of this action. Because Schroeder's "disability" not longer exists, the guardian, parent and next friend designations should be removed. Pursuant to Fed. R. Civ. P. 17, Chad Schroeder will be required to proceed with this litigation in his individual capacity as the real party in interest.

Chad Schroeder is currently on active duty with the United States Air Force and is stationed overseas. His discharge date is more than two years from now. According to Darcey Shimitz, Schroeder's mother, Schroeder has requested a leave from his commanding officer so that he may attend the trial of this case, currently scheduled for July 17, 2007. The commanding officer has not yet responded to the request.

Schroeder is covered by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, codified at 50 App. U.S.C. § 501 *et seq.* (hereafter the "Act"). Schroeder is in active military service and has received notice of the action or proceeding, which is evidenced by his request to his commanding officer for leave to attend the trial. (Filing No. 466). According to the Act, the Court must stay the proceedings upon application by Schroeder any time before final judgment is entered, (or may stay the action on the Court's own motion), provided two conditions are satisfied. The Act requires that the application for a stay "shall include the following:

- (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
- (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter."

50 App. U.S.C. § 522(b)(2).

The requirements of subsection (A) have been satisfied through Darcey Shimitz's Affidavit. However, the record does not include a communication from Schroeder's commanding officer stating that Schroeder's current military duty prevents his appearance and that leave has been denied. Schroeder's motion for a continuance does not satisfy the requirements of the Act, though there is ample evidence that Schroeder is attempting to satisfy the Act's requirements. Accordingly, the Court will grant the unopposed motion to continue the case until further order of the Court.

The Plaintiffs will file the commanding officer's response to Schroeder's request for leave, if any, with reasonable promptness upon Schroeder's receipt of same. In addition and consistent with their stated intention to do so, the Plaintiffs will notify the Court and the Defendant if Schroeder is granted leave such that this case could be reset for trial.

For these reasons,

IT IS ORDERED:

1. The Defendant's Motion to Substitute the Real Party in Interest (Filing No. 452) is granted;
2. The Clerk is directed to remove the natural guardian, parent and next friend designations attributed to Plaintiffs Rick Shimitz and Darcey Shimitz on behalf of Chad Schroeder, and the caption of this case will reflect that Chad Schroeder will proceed in his individual capacity;
3. The Plaintiffs are directed to keep Defendant's counsel and the Court apprised of the developments relating to Plaintiff Chad Schroeder's request of his commanding officer for leave to attend the trial of this case; and
4. The Unopposed Motion to Continue Trial (Filing No. 461) is granted, and the trial previously scheduled to commence on July 17, 2007, is continued indefinitely until further order of the Court.

DATED this 12th day of June, 2007.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge